

AAPT Submission on ACCC, “Resolution of Telecommunications Access Disputes - Draft Guide”

14 June 2002

1 Executive Summary

AAPT strongly supports the Australian Competition and Consumer Commission (**Commission**) initiative of issuing a guide to access dispute resolution (**Guide**). AAPT considers that it will provide a sound basis for managing arbitrations and minimising opportunities for parties to abuse Part XIC’s procedural provisions for the sake of undermining substantive outcomes.

Overall, AAPT supports the substance of the “Draft Guide on Resolution of Telecommunications Access Disputes” (**Draft Guide**) and notes that many of the comments in the Draft Guide reflect current Commission practice.

This submission discusses four points that AAPT considers should inform the Commission’s application of the Guide. These are:

- the Commission can take a more robust view of its powers under Part XIC;
- the distinction between procedural and substantive fairness;
- the different roles performed by the Commission and Commission staff; and
- the distinction between dispute resolution and dispute determination.

In addition, there are several particular issues on which AAPT makes comment:

- (a) use of conferences, as opposed to written submissions;
- (b) access to information and confidentiality arrangements;
- (c) the role of experts;
- (d) notification and the “unable to agree” requirement;
- (e) joint hearings; and
- (f) backdating.

2 General comments on the Draft Guide

2.1 The Commission can take a more robust view of its powers under Part XIC

A comparison of AAPT’s experience during the arbitration of its PSTN dispute against Telstra and the subsequent Review before the Australian Competition Tribunal suggests that the Commission has been restrained in the use of its powers to control arbitral processes. Applying the same set of procedural rules, the Tribunal was more exacting in its demands that the parties focus on the issues before it and it showed a much lower tolerance of procedural applications than the Commission.

It was appropriate that the Commission took a relatively conservative approach to the exercise of its powers in the early years of the arbitration regime. However, the Commission should now use its experience as a basis for moving to a more robust approach to resolving disputes.

The Phillips Fox Review makes a similar point.¹ Further, the Parliament clearly intended that Part XIC be used as an antidote to market power by providing extensive powers for the Commission to ensure the effective and fast settlement of access disputes. This intent is reinforced by the amendments made to the Part in the *Trade Practices (Telecommunications) Amendment Act 2001*.

2.2 Substantive v procedural fairness

The Draft Guide makes the distinction between preliminary and substantive phases of a dispute. This structure recognises the important distinction between the procedural and substantive elements of arbitrations.²

AAPT understands the importance of procedural fairness and supports most rights of appeal. However, the complexity of the arbitration regime and the availability of too generous appeal and review rights has often forced the Commission to focus on procedural issues at the expense of substantive ones, in order to minimise the risks of parties seeking reviews of determinations.

The Guide will offer an opportunity to resolve procedural issues, to focus on substantive issues and to minimise procedural distractions. AAPT submits that the Guide should make clear that where a party wishes to take a procedural point, there should be an onus on the party to show that any detriment to it and, more importantly, to end-users, *in the particular case* will outweigh the benefits of efficient dispute resolution.

2.3 The role of Commissioners and Commission staff

The Guide currently envisages the role of ACCC staff as managing the process of arbitrations. AAPT has had concerns in some previous cases that there is not a clear enough separation between the role of staff and Commissioners and that, in effect, most significant decisions will be made by staff and communicated as recommendations to the Commissioners.

AAPT agrees with the recommendations in the Phillips Fox Review that the roles be more clearly delineated. In particular, the internal processes used by the Commission to determine arbitrations are often opaque and, where arbitration hearings are not held, it is sometimes a concern to the parties that the Commissioners are not principally responsible for drafting determinations. This concern is even more evident where outcomes in individual arbitrations are closely related to public processes, such as the determination of pricing principles.

AAPT supports the first option mentioned in recommendation 7 in the Phillips Fox Review – that staff papers to the Commissioners be made available to the parties prior to their incorporation into arbitration determinations. The particular concern in regard to simultaneous consideration of pricing principles should be

¹ Phillips Fox Review, page 20.

² Section 152CWA defines “procedural powers” of the Commission as any powers other than making, varying or revoking a determination or issuing a draft determination.

largely resolved through the 2001 amendment requiring publication of pricing principles with declaration decisions.

2.4 Dispute resolution v dispute determination

Part XIC includes powers for the Commission to determine disputes (section 152CP) as well as to direct the parties to negotiate, attend mediation conferences and the like (see pages 15-18 of the Draft Guide).

There is an important distinction to be drawn between the Commission's roles in seeking to help the parties achieve a resolution and the role it plays in ultimately determining the dispute.

One technique for settling disputes which AAPT has found effective in the past is the use of resolution and determination processes in parallel. Referring particular issues for the parties to mediate or negotiate will often substantially reduce the costs and time required to conclude the arbitration. The approach seems most successful when the ADR element of the dispute includes a requirement to report back to the Commission within a certain timeframe. Parties also need to be clear about which resolution process is being applied at each time.

This "two-track" approach to dispute resolution should, in AAPT's view, be more prominent in the Draft Guide and applied more often.

3 Comments on particular issues raised in Draft Guide

3.1 Written submissions and hearings

In AAPT's experience, written submissions are most effective when used in the preliminary phase of a dispute to narrow the issues between the parties and in the determination phase of a dispute, when final arguments need to be made.

Conversely, hearings or conferences have many advantages during the substantive phase, such as:

- to facilitate dialogue between the ACCC and the parties;
- to assist in more quickly narrowing the identified issues in dispute; and
- to provide the Commissioners with an immediate understanding of the strong and weak points of the parties' cases.

Instead AAPT would suggest that more emphasis and resources be placed on the conferences between the ACCC and the parties during the substantive phase of disputes.

AAPT considers the additional costs of holding conferences will more often than not be outweighed by savings from reducing the length of disputes and better focussing of the arbitration on the significant issues.

The benefits of written submissions need not be lost. AAPT notes that the Commission says that "in some instances, the Commission may direct the parties that submissions should be provided in summary form only, with the parties then being given an opportunity to supplement them at conferences with Commissioners". The provision of summary submissions by the parties prior to the conference should be a standard process, while full written submissions be

provided after the conference as the issues in dispute will presumably be narrower.

To expedite the process further, AAPT urges the adoption of a process similar to that used in most courts that, prior to the conference, parties provide draft orders that they wish the ACCC to make.

3.2 Confidentiality and information flow

AAPT strongly supports a transparent process, whereby all parties can access the information and material provided to the ACCC throughout an arbitration. This ensures that parties can comment on the information and frankly exchange views with full knowledge of material's contents. Not only does this allow the Commissioners to make informed decisions, in AAPT's experience, it encourages settlement of disputes between the parties.

AAPT advocates a strong onus of proof on parties who seek to maintain the confidentiality of their documents from other parties to the arbitration. AAPT is aware of many instances of confidentiality being claimed for material which was already in the public domain.

AAPT considers that in addition to the factors listed by the ACCC on page 38 of the Draft Guide, a party would need to demonstrate the following to keep their documents confidential:

- the extent to which non-disclosure of the documents would not be in the public interest; and
- the extent to which disclosure or non-disclosure would encourage early resolution of the dispute.

Where disclosure of documents or information is to be limited, following consideration under 152DK, the arrangements should be clear and consistent. In particular:

- the terms of any confidentiality undertakings should be in a form determined by the Commission;
- the categories of persons who may have access to the documents should be clear and the number of categories should be limited to named internal advisers and external legal/economic advisers.

In regard to the disclosure of information between disputes, AAPT agrees with the procedures outlined in the Draft Guide.

3.3 Experts

It will be difficult to ensure the independence of experts in the circumstances of an arbitration.

The approach suggested by Phillips Fox is to impress upon the parties and their experts the "duty to the process" in order to ensure that they remain independent and impartial. In practice, this is no more possible than ensuring a party's legal advisers are principally motivated by a duty to the process than to their clients.

AAPT considers a better approach may be for the parties to have their own experts and to assist the Commission in the selection of an independent expert to advise the Commission. Procedures should then be established to ensure the

expert is provided with only relevant factual material and submissions from the parties and that the expert inquiry be limited to particular questions.

3.4 Notification and the “unable to agree” criterion

The Commission is only empowered to hear an access dispute where the parties are “unable to agree”. The Draft Guide indicates that this will be a low threshold.

As commercial agreements become more common, it is increasingly likely that the Commission will be called on to consider whether it should hear disputes where an agreement is on foot.

In such situations, AAPT considers that the Commission ought to hear the dispute but should be mindful of the increased possibility and benefit of resolution of the dispute by alternative means. The comments above on the use of simultaneous resolution and determination tracks may be more appropriate in such circumstances, particularly where the parties have agreed on a particular form of mediation or mediator.

3.5 Joint hearings

AAPT agrees generally with the approach outlined in Chapter 5 of the Guide describing the process and reasons for joint hearings on issues that are common to concurrent arbitrations.

However, the benefits that accrue from joint hearings or joining parties must be weighed carefully against any delays that may occur because of the decision to join parties or hold joint hearings. The resolution of individual disputes should not be delayed in order to complete the general process.

AAPT takes this view for the following reasons:

- issues applicable to or in dispute in the general process may not be relevant for the individual dispute;
- the resolution of individual disputes is more likely to take place if information specific to that dispute is provided to the parties, rather than in the context of a public process;
- information arising out of the individual disputes may assist in making determinations in other disputes; and
- delay caused by the waiting of a general process discourages parties to notify the ACCC of legitimate disputes.

In several disputes to which AAPT has been a party, public processes have been run to determine certain issues, such as pricing principles. This has often resulted in extensive delays to the resolution of individual disputes, because of the additional administrative burdens created by public processes. In the interim, the disputes before the Commission seemed to be suspended until the public process was concluded. Such an approach is, in AAPT’s view, at odds with the Parliament’s intent in requiring the Commission to resolve disputes quickly.

As noted above the requirement to publish pricing principles with declarations should reduce the instance of such parallel considerations. However, any of the ACCC’s processes can benefit by the application of the processes recommended for dispute resolution designed to refine the nature of the dispute and to gather

expert evidence on specific points. AAPT encourages the Commission to consider such approaches in any review of PSTN pricing principles.

3.6 Backdating

AAPT strongly supports the Commission's general approach to backdating set out in the Draft Guide and the awarding of interest on backdating payments.

The Commission indicates that it will consider the parties' conduct prior to and during the dispute in deciding whether to backdate a determination. The Commission gives the example of where an access provider makes a settlement offer close to or substantially similar to the Commission's final determination but which the access seeker refused.

AAPT disagrees with this aspect of the approach.

Courts will often consider parties' conduct in making costs orders but it is rare that substantive findings will be changed because a settlement offer ultimately proves to have been reasonable. The approach suggested in the Draft Guide favours procedural efficiency (creating the incentive for settling a dispute) over substantive fairness (setting the correct access price for the period in question). Further, because of the information asymmetry between access-seekers and access-providers, it cannot be assumed that an access seeker should be able to recognise a settlement offer which is "substantially similar" to the Commission's final determination.

The Commission might instead address instances of unnecessary delay caused by an access seeker by re-considering the award of interest on a backdated payment to .

4 Conclusions

AAPT views the Guide as an important step in clarifying the process by which the ACCC approaches its role in telecommunications access disputes.

It will allow the Commission to apply a consistent set of principles and processes to the determination of disputes and to more efficiently and fairly resolve disputes. AAPT considers that the Commission should give more attention to the potential for "two-track" arbitration processes where both resolution and determination tools are used and should more clearly delineate between the roles played by staff and the Commissioners themselves.